

May 2, 1979

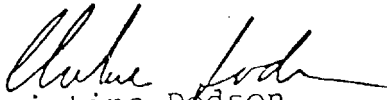
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MEMORANDUM FOR:

THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
THE DIRECTOR, OFFICE OF
MANAGEMENT & BUDGET
COUNSEL TO THE PRESIDENT
CHAIRMAN, JOINT CHIEFS OF STAFF
DIRECTOR OF CENTRAL INTELLIGENCE
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
DIRECTOR, NATIONAL SECURITY AGENCY

SUBJECT: Background Paper for SCC Meeting

Attached is a background paper prepared by Justice for the
SCC meeting on Intelligence Charters scheduled for May 8 at
11:15 a.m.


Christine Dodson
Staff Secretary

Attachment

INTELLIGENCE CHARTER - REMEDIES ISSUES
Approved For Release 2005/11/23 : CIA-RDP81B00401R001400170012-9
Introduction

S. 2525 contains various criminal and civil sanctions for activities undertaken in violation of restrictions contained in the bill. Since the introduction of S. 2525 two significant developments have occurred which affect resolution of the issues relating to remedies. The Foreign Intelligence Surveillance Act of 1978 (FISA) was enacted with civil and criminal penalties for engaging in electronic surveillance in violation of that Act. The Administration also developed a position on broad-scale revisions to the Tort Claims Act (S. 695, H.R. 2659). */ The FISA provisions set a framework for regulating overseas electronic surveillance and physical searches for intelligence purposes. The introduction and consideration of the Tort Claims amendments provides a possibility of dealing with most of S. 2525's remedy provisions in the context of that legislation rather than legislation focused on the Intelligence Community. Thus the major issues at this time are whether to stay with the precedents set in FISA and to deal with civil liability in the Tort Claims Amendment context or to have separate provisions on remedies in the Administration's intelligence charter legislation. An additional issue concerns a statutory provision precluding injunctive relief or suppression of evidence for violations of intelligence restrictions.

I. Criminal Provisions for Electronic Surveillance or Physical Search Without a Court Order

The FISA imposes criminal penalties on any person, whether a government official or not, who intentionally engages in electronic surveillance except as authorized by statute. The SCC has already decided to require a court order to gather intelligence through electronic surveillance and physical searches abroad, with certain exceptions. The SCC has already decided to include criminal penalties for physical searches in the United States undertaken in violation of the statutory provisions when it decided to extend FISA to physical searches. That decision is reflected in the materials disseminated by David Aaron on March 14. No comparable decision has been made for electronic surveillance or physical overseas searches.

*/ The CIA has expressed some reservations concerning the benefit to be derived from the proposed amendments, and may ultimately decide not to support them.

The remaining issue is whether the position on criminal sanctions in FISA should be extended to overseas electronic surveillance or physical searches.

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OPTION A - Extend the FISA principle and apply criminal penalties for electronic surveillance or physical searches undertaken overseas without a court order when such an order is required.

OPTION B - Do not apply criminal sanctions to overseas electronic surveillance or physical searches without a court order.

II. Civil Penalties

S. 2525 contained several civil remedy provisions for violations of intelligence charter restrictions. In summary, those provisions established:

1) Liability for both the Government and the official for illegal electronic surveillance, physical search, mail opening, human experimentation, or other acts undertaken for the purpose of interfering with an exercise of constitutional rights;

2) Liability for the Government alone for any violation of the charter restrictions which also constituted a violation of constitutional rights.

FISA contains a civil remedy provisions which covers illegal electronic surveillance in the United States. The SCC has already agreed to provide a civil remedy for illegal physical searches in the U.S. when it decided to extend FISA to physical searches.

The Administration is now supporting amendments to the Tort Claims Act which would have the following effects:

1) Waive sovereign immunity and permit suits against the U.S. for any acts by government officials, including intelligence agents, which violate a person's constitutional rights.

2) Preclude any suits against individual officials for constitutional violations unless the official was acting outside the scope of office and invoking a claim of official power which did not in fact exist.

3) Establish as a trade-off for individual immunity, a system of administrative disciplinary proceedings and allow an individual who has been the victim of a deprivation of constitutional rights to request initiation of an administrative proceeding to discipline the officials responsible for the deprivation.

The scope of the Tort Claims amendments differs from S. 2525. It is broader in some respects and narrower in others. S. 2525 restricts its remedies to activities caused by intelligence officials while the Tort Claims amendments apply to all government officials. S. 2525 provides a remedy only for constitutional violations that are also violations of the charter restrictions while the Tort Claims amendments allow for recovery for any violation of constitutional rights, regardless of whether it also violates a statutory provision. S. 2525 would, however, create a remedy for illegal human experimentation while the Tort Claims amendments would not. S. 2525 does not contain provisions for administrative disciplinary procedures.

OPTION A - Do not include any special civil liability provisions in the intelligence charter.

OPTION B - Include a special civil liability provision for illegal overseas electronic surveillance or physical search to conform to FISA, but with respect to all other civil liability issues, leave the subject to the Tort Claims Amendments.

OPTION C - Include special civil liability, provisions for intelligence activities regulated by the charter, but leave remedies for other subjects to the Tort Claims Amendments. [If this option were chosen, a range of specific options could be developed for SCC consideration.]

OPTION D - Develop civil remedy provisions for the intelligence charter independently from the Tort Claims amendments. [If this option were chosen, a range of specific options could be developed for SCC consideration.]

OPTION E - Include a provision that no cause of action, whether for an injunction or otherwise, shall exist for any action that does not comply with guidelines, rules or procedures issued under the charter.

III. Preclusion of Injunctive Relief or Suppression of Evidence

One concern that has been raised about the adoption of statutory restrictions on intelligence techniques is that such provisions may give rise to lawsuits to enjoin intelligence activities or to suppress evidence obtained in violation of the restrictions. Concern over possible suppression has been reduced as a result of the Supreme Court's decision in United States v. Caceres that evidence obtained in violation of IRS regulations would not be suppressed unless there was some violation of a constitutional right, but enactment of a statutory provision would provide further security against suppression. A statutory provision would be necessary to insure that injunctions are not granted to stop intelligence investigations, although such a provision may prove ineffective and unconstitutional in cases where the illegal activities are egregious. Advocating any such provision might result in more stringent civil remedies or disciplinary proceedings.

OPTION A - Include a provision barring suppression of evidence obtained in violation of statutory restrictions of the charter.

OPTION B - Include a provision barring injunctions against investigations for violations of statutory restrictions.

OPTION C - Do not include any special provision covering suppression or injunctions.